

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON J. GREEN,

Defendant-Appellant.

UNPUBLISHED

October 3, 1997

No. 193531

Oakland Circuit Court

LC No. 95-140892 FC

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

Defendant was convicted by jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). Defendant now appeals by right his conviction of assault with intent to commit great bodily harm and proportionality of the 6-1/2- to 10-year sentence imposed therefor. We affirm.

Defendant first contends the trial court erred in failing sua sponte to strike from the record testimony of one witness concerning threats allegedly made against her, or to otherwise give the jury a curative instruction about this testimony. The testimony was never related to defendant, and, outside the presence of the jury, it was established that the source of the threats was indeed not the defendant. Yet the defense never sought to elucidate this mitigating fact for the jury, nor did it request a curative instruction or that the testimony be stricken. Given the lack of request for curative instruction, reversal is unwarranted unless a miscarriage of justice occurred. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). As the contested issue at trial was defendant's intent, no miscarriage of justice will occur if this unpreserved issue is rejected as a basis for appellate relief.

Defendant also contends that his 6-1/2- to 10-year sentence is disproportionate to the offense and the offender. The sentence is within the guideline range, and is, therefore, presumptively proportionate. Defendant has failed to overcome this presumption. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood